

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

CUISINE SOLUTIONS, INC.¹

Employer

and

Case 05-RC-155724

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 400**

Petitioner²

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of all full-time and part-time employees classified as operators who work in the preparation, freezer, packing, retail packing, multivac, sanitation and receiving departments employed by the Employer at its Alexandria, Virginia facility, where the Employer produces, manufactures, and distributes premium frozen and fresh foods.³ The Employer maintains that the unit sought by the Petitioner is not appropriate, and that the only appropriate unit must also include operators working in the thermix, cryomix, sauce, and scaling departments. Moreover, the Petitioner would exclude individuals classified by the Employer as supervisor, shift leader I and shift leader II from the petitioned-for unit because it asserts they are supervisors within the meaning of Section 2(11) of the Act.

A hearing officer of the Board held a hearing in this matter, and the parties subsequently filed briefs. On the issue of the appropriateness of the unit, the Petitioner argues the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, and that the Employer failed to show that the employees it seeks to include share an overwhelming

¹ The name of the Employer appears as amended at the hearing, to reflect its correct legal name.

² The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

³ The Petitioner amended the description of its petitioned-for unit at the hearing to correct a misspelling. The petition, as orally amended, describes the unit as: “[a]ll full time and part time employees working in food preparation, food storage (blast freezer), and food packing (multivac); employees who operate the grill/broiler; and sanitation workers.” At the hearing, the parties stipulated that employees in the receiving department should also be included in any unit found appropriate by me or the National Labor Relations Board. The Petitioner would exclude the following employees from the unit: “chefs and other food preparation specialists employees in the ‘thermix,’ ‘cryomix,’ and pasta/sauce departments; trucking, maintenance, delivery, quality control, and office-clerical employees; employees classified as supervisors, shift lead I and shift lead II, and supervisory employees as defined under the Act.”

community of interest with the petitioned-for unit. The Petitioner argues the employees in the petitioned-for unit do not have interchange or interaction with employees in the thermix, cryomix, sauce, and scaling departments, as well as that employees in the petitioned-for unit have less training, different supervisors, and are subject to more physically dangerous working conditions. By contrast, the Employer contends the production departments, including the thermix, cryomix, sauce, and scaling departments, all share a community of interest in its highly-integrated plant, where production operates on a continuous flow process. On the issue of supervisory status, the Petitioner argues the individuals classified by the Employer as supervisor, shift leader I and shift leader II are Section 2(11) supervisors because they are assigned to specific departments, transfer employees to other departments, perform oversight, initiate the disciplinary process, receive employee complaints, are regarded by employees as supervisors, and responsibly direct employees. The Employer argues these individuals are not Section 2(11) supervisors because they have no authority to hire, fire, or suspend employees, do not interview potential job candidates, cannot transfer employees from one department to another, have no authority to grant employees' request for time off, have no authority to discipline or authorize overtime work, do not use independent judgment, primarily work alongside the operators, and share the same wages, hours, and terms and conditions of employment as operators.

As described below, based on the record and relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enf'd. 727 F.3d 552 (6th Cir. 2013), I find that the petitioned-for unit is a fractured unit and not appropriate. Instead, I find that the smallest appropriate unit encompassing the petitioned-for employee classifications must also include the employees in the thermix, cryomix, sauce, and scaling departments. See *ASV, Inc.*, 360 NLRB No. 138 (2014). In addition, I find that the Petitioner did not meet its burden of establishing that the individuals classified by the Employer as supervisor, shift leader I and shift leader II are Section 2(11) supervisors.⁴ At the hearing, the Petitioner indicated it would proceed to election in any alternate unit if I determined the petitioned-for unit was inappropriate. Therefore, I direct that an election be held for the following bargaining unit:

All full-time and regular part-time employees classified by the Employer as operator, supervisor, shift leader I and shift leader II in the receiving, scaling, sauce, cryomix, preparation, multivac, thermix, freezer, packing, retail packing, and sanitation departments employed by the Employer at its Alexandria, Virginia facility, excluding all chefs, employees in the trucking, maintenance, delivery, and quality control departments, office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.⁵

⁴ In light of my finding that the Petitioner did not meet its burden and for ease of reference, I shall refer to these individuals by their classifications (supervisors; shift leader I; shift leader II).

⁵ The parties stipulated, and I find, there is no contract bar, or other bar, to an election.

THE EMPLOYER'S OPERATIONS

The Employer is engaged in the production, manufacturing, and distribution of premium frozen and fresh foods from its facility in Alexandria, Virginia.⁶ A chief executive officer, president, and chief operating officer, among others, oversee the corporation. The Alexandria facility is organized into at least three segments: production; distribution; and quality control. Production, where employees in the petitioned-for unit and the proposed unit inclusions work, is overseen by a production director, three production managers, and three assistant production managers. Production contains the following departments: receiving; scaling; food preparation; cryomix; sauce; multivac; thermix; sanitation; freezer; packing; and retail packing. All of the production departments, except for retail packing, are located in the same building. Retail packing and distribution are located in a separate, nearby building. Employees in production generally work on two shifts, with the facility operating nearly 22 hours a day. The Employer employs slightly more than two hundred employees in the production segment of its Alexandria facility.⁷ The employees are classified as operators, supervisors, shift leader I or shift leader II.

In preparing food, the Employer uses a *sous-vide* cooking method, whereby food is vacuum-sealed and submerged in hot water to cook. The production process begins when employees in the receiving department receive incoming raw material, check the product to verify the quantity and temperature, and place the product in the freezer or cooler.⁸ Employees in the scaling department weigh and portion out the ingredients and spices needed for each recipe.⁹ Meanwhile, employees in the sauce department create the sauces to be used in the recipes.¹⁰ The next step in the production process involves either the preparation department or

⁶ The parties stipulated, and I find, that in the past twelve months, the Employer, in conducting its business operations described above, purchased and received goods valued in excess of \$50,000 from directly outside the state of Virginia. The parties further stipulated, and I find, the Employer is engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.

⁷ The Petitioner estimates there are approximately 130 to 140 employees in its petitioned-for unit, as amended at the hearing. The Employer estimates there are approximately 219 employees in its proposed unit, including those employees classified as supervisors by the employer, and shift leader I and shift leader II.

⁸ There are 4 operators, 2 supervisors, 2 shift leaders I, and 2 shift leaders II in the receiving department. The number of employees in each department, described in this and subsequent footnotes, comes from the lists submitted by the Employer in its Statement of Position, which was made a part of the record.

⁹ There are 6 operators, 1 supervisor, 1 shift leader I, and 2 shift leader II in the scaling department.

¹⁰ There are 3 operators, 3 supervisors, 2 shift leaders I, and 3 shift leaders II in the sauce department.

the cryomix department. Employees in the preparation department remove products, either frozen or fresh, from boxes, and then place products on trays. If the product is not pre-portioned, an employee will portion the product, such as a type of protein (e.g., chicken, beef, fish), place it on a tray, apply spices and seasonings according to the recipe, and begin the cooking process by placing the protein on a grill, broiler, or searing plates to give it color.¹¹ The employees then put the protein product in the cooler to chill. There are approximately three rooms within the production department where employees work with different proteins. As for the cryomix department, employees there work exclusively with pasta or rice dishes, and employees use a machine to combine the pasta and sauces and prepare the dishes for packing.¹² Pasta and rice dishes account for only about five percent of the Employer's total production. Thus, the cryomix department is often closed, and employees in that department are moved to other departments in production, such as preparation, sauce, multivac, or packing. Likewise, the sauce department is sometimes closed due to low production demand, and employees who are regularly assigned to the sauce department are instead assigned to work in other production departments, such as preparation, packing, or multivac departments. The scaling department is physically next to the preparation department, and employees from the scaling department take the ingredients and spices to the preparation department for protein products and to the cryomix department for pasta and rice dishes. The sauce department, meanwhile, is immediately next to the portion of the preparation department where employees sear the protein. That portion of the preparation department is also next to the area where the multivac and thermix areas are located.

After the preparation department or cryomix department, the product goes to the multivac department, where it is removed from the cooler, placed in the appropriate container, and vacuum-sealed. The product travels on a conveyor belt through the multivac department and employees operate machines to vacuum-seal it.¹³ Next, the product goes to the thermix department, where employees cook it in the *sous-vide* method and then chill it in the cooler.¹⁴ The multivac and thermix departments are located in the same room and work closely together, such that both departments operate on the same schedule. Employees in the freezer department take the product out of the cooler and freeze it by using either a blast freezer or spiral freezer.¹⁵

¹¹ There are 53 operators, 8 supervisors, and no shift leader I or shift leader II in the preparation department.

¹² There are 3 operators, 1 supervisor, and 1 shift leader II in the cryomix department.

¹³ There are 35 operators, 7 supervisors, 2 shift leaders I and 2 shift leaders II in the multivac department.

¹⁴ There is 1 operator, 2 supervisors, 1 shift leader I and 1 shift leader II in the thermix department.

¹⁵ There are 3 operators, 1 supervisor, and 1 shift leader II, but no shift leader I, in the freezer department.

Afterwards, the product then goes either to the packing or retail packing department.¹⁶ The packing department is immediately next to the room where the multivac and thermix departments are located. The retail packing department, however, is located in a separate, nearby building. Finally, employees in the sanitation department clean, sanitize and inspect the equipment and floors.¹⁷ The sanitation department is located approximately six to eight feet from the portion of the preparation department where protein is seared.

Each day, the production director, in conjunction with the production managers and assistant production managers, review the production schedule and determine how many employees will work in each department, as well as what tasks each department needs to complete. The production director also decides if any overtime work needs to be scheduled, and the time when the departments will begin operating. In addition, the production director assigns employees to the morning or afternoon shift. The production director and managers have the authority to reassign employees to other departments. They make hiring decisions and interview potential job candidates. The production director, managers, and assistant managers are salaried.

Employees classified as supervisor, shift leader I and shift leader II are assigned to specific departments in production.¹⁸ Each production department has at least one supervisor, but not every production department has a shift leader. The supervisors report to work about a half-hour before the shift starts to prepare the room and get the machines ready for work. Supervisors train new employees on the work to be performed in the department. The shift leaders check the production area in their department to ensure the machines are operating properly and the employees are performing the tasks correctly. The shift leaders also enter data in the Employer's computer system regarding the production. Either a supervisor or shift leader can re-train an employee by coaching the employee on the proper way to perform an assigned task. As described above, the production director and managers determine how many employees will work in each department and the tasks to be completed each day; the production director and managers then inform the supervisors and shift leaders of these decisions. The supervisors and shift leaders direct employees in the department to specific tasks according to the order in which they report to work. They may rotate employees among tasks within the department, in consultation with production managers, but they do not have authority to move employees to other departments. Neither supervisors nor shift leaders may request additional employees, or reduce the number of employees, assigned to the department by the production director.

¹⁶ There are 6 operators, 4 supervisors, 1 shift leader I, and 2 shift leaders II in the packing department and 15 operators, 5 supervisors, and 2 shift leaders II, but no shift leader I, in the retail packing department.

¹⁷ There are 12 operators, 4 supervisors, 3 shift leaders I, and 2 shift leaders II in the sanitation department.

¹⁸ The Employer classifies the shift leaders as "shift leader I" and "shift leader II." At the hearing, the production director testified there is no difference between the designation of "I" and "II." They are collectively referred to as "shift leaders" in portions of this decision for purposes of discussing their collective duties and authority.

Operators may raise concerns and complaints with a supervisor or shift leader, but those issues are then taken to, and handled by, a production manager. If a disciplinary issue arises, the supervisor or shift leader informs the production director or manager, and the production director then investigates the facts and determines whether or not to issue discipline. The production director does not consult with the supervisor or shift leader, nor do they give a recommendation regarding discipline. Moreover, the production director does not inform the supervisor or shift leader of his decision regarding discipline. Written disciplinary actions are signed by the Employer's human resources official. The human resources office provides input regarding the suspension of employees, and makes decisions regarding the discharge of employees. Supervisors and shift leaders do not participate in the hiring process and do not attend management meetings. They do not grant employee requests for time off, and they do not maintain employee time records. They also do not approve overtime work. Supervisors and shift leaders do not prepare employee performance reports. Supervisors and shift leaders are paid an hourly wage rate, like the operators.

All of the Employer's production employees, including the supervisors and shift leaders, receive the same employee handbook, training, and benefits. The work attire consists of white shirt and pants, with a solid colored apron in various colors. The color of the apron corresponds to different areas of production and serves to distinguish the areas and prevent cross-contamination. Regarding training, the amount of training required for employees to learn the tasks in each production department is generally one or two weeks, but may take two to three weeks for the receiving and retail packing departments, a month for the sanitation department, and more than a month for the sauce department. Employees may be reassigned by the production director and manager to other departments, depending on production needs. The multivac and preparation departments are most likely to have employee interchange because they are the largest departments. The Employer pays its production employees an hourly wage rate that ranges from about eight to nine dollars.

BOARD LAW

The first issue is whether the petitioned-for unit is appropriate. The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare*, supra, slip op. at 7.

Thus, the initial inquiry is whether the job classifications sought by the Petitioner are readily identifiable as a group and share a community of interest. In doing so, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into

the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002), see also *Specialty Healthcare*, supra, at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the subsequent inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

The second issue is whether employees classified by the Employer as supervisor, shift leader I, and shift leader II are supervisors within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)). Section 2(11)'s definition is read in the disjunctive, and thus the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, e.g., *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.* The burden of proving supervisory status rests on the party asserting that status. See, e.g., *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

APPLICATION OF BOARD LAW TO THE FACTS

The Employees in the Unit Sought By the Petitioner Are Not Readily Identifiable as a Group and Do Not Share A Community of Interest Independent of Employees in the Four Disputed Departments

First, the unit sought by the Petitioner is a fractured unit and, as such, is not readily identifiable as a group. That is, there is no rational basis for excluding employees in the thermix, cryomix, sauce, and scaling departments, while including employees in other production departments sought by the Petitioner in the unit. *Seaboard Marine*, 327 NLRB 556 (1999), quoted in *Specialty Healthcare*, supra at 13. In the language of the District of Columbia Circuit in *Blue Man Vegas LLC v. NLRB*, supra at 421, there is “no legitimate basis upon which to exclude” employees in the thermix, cryomix, sauce, and scaling departments while at the same time including all the other production departments sought by the Petitioner.

With regard to my conclusion that the unit sought by the Petitioner is a fractured unit, I find that the unit sought by the Petitioner does not track any administrative lines drawn by the Employer, such as classification, department or function. *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011). The classifications are the same in all of the production departments. It is not a department-based unit because the Petitioner selects some, but not all, of the production departments and fails to differentiate the departments it seeks to include from those it seeks to exclude. *A.S.V., Inc.*, 360 NLRB No. 138 (2014). Finally, the classifications sought by the Petitioner are not drawn along functional lines. In fact, each department in production has a role in converting the raw material, received by employees in the receiving department, to the finished product, packaged by employees in the packing and retail packing departments, and the tasks that employees in each department perform in that process are related to, and in some cases dependent on, the tasks performed by employees in other production departments. The cryomix department, one of the excluded departments, is an integrated part of the production flow, even though it works solely on pasta and rice dishes, because it performs work necessary and antecedent to the product reaching the multivac department and then the freezer and packing departments, all included in the petitioned-for unit. Furthermore, the cryomix department depends on work performed by the receiving department, also included in the petitioned-for unit, to perform its work.

Nor is the unit sought by the Petitioner structured along lines of supervision. *Odwalla, Inc.*, supra. In this regard, the Petitioner seeks to represent employees in the receiving, preparation, multivac, freezer, packing, retail packing, and sanitation departments, and yet employees in those departments are supervised by the production director, production managers, and assistant production managers, who also supervise employees in the scaling, cryomix, sauce, and thermix departments, whom the Petitioner would exclude from the unit. The fact that each department is assigned specific employees classified by the Employer as supervisor and shift leader is irrelevant to this part of the analysis because, as described further below, I find these employees are not Section 2(11) supervisors. Thus, the Employer has established that the employees in the included and excluded departments all share common supervision. *A.S.V., Inc.* and *Odwalla, Inc.*, supra.

The unit sought by the Petitioner is also not drawn in accordance with differing methods of compensation or differing benefits. On the contrary, the employees in dispute are paid an hourly wage rate, all within the same range, and the excluded employees have the same benefits as the employees the Petitioner seeks to represent. The record does not show any significant distinction among the departments according to wage rate or benefits. In fact, employees in the receiving department (which the Petitioner seeks to include) have a higher starting hourly wage rate (\$9.00/hr) than employees in any other production department, both those the Petitioner seeks to include and those it seeks to exclude. Nevertheless, the Petitioner groups employees in the receiving department with employees from the other production department in its petitioned-for unit. Thus, there is nothing to distinguish the employees the Petitioner seeks to exclude from the employees the Petitioner seeks to represent, when comparing methods of compensation or benefits. *A.S.V., Inc.* and *Odwalla, Inc.*, supra.

In sum, I cannot determine any coherent basis for including some of these departments in the petitioned-for unit, while excluding other departments. For example, the Petitioner seeks to include the employees in the receiving department in a unit with the employees in the preparation department, but the Petitioner seeks to exclude the employees in the scaling department, who weigh and portion product received by the employees in the receiving department before providing that product to the employees in the preparation department. Likewise, the Petitioner seeks to include employees in the multivac department (who vacuum-seal the product) in a unit with the employees in the freezer and packing departments, but the Petitioner seeks to exclude the employees in the thermix department, who cook the vacuum-sealed product before it is frozen and packed. I thus view the Petitioner as seeking a group of departments in an integrated production process, while excluding specific departments in that integrated production process for reasons for which no rational basis has been provided and thus appear arbitrary.

The Petitioner attempts to distinguish the production departments by arguing employees in the departments it seeks to include: 1) lack interchange or interaction; 2) have less training; 3) have different supervisors; and 4) are subject to more physically dangerous working conditions than employees in the four departments it seeks to exclude. I find that the Petitioner's arguments are not persuasive. First, the record shows there is interchange and interaction among employees in all of the production departments, including the four departments that the Petitioner would exclude from the unit. When the cryomix and sauce departments are closed due to low production demand, employees from those departments, which the Petitioner would seek to exclude, are assigned to work in the preparation, multivac, or packing departments, all of which the Petitioner seeks to include. Furthermore, the continuous flow nature of the Employer's production process requires some interaction among employees in the various production departments. For example, employees from the scaling department, which the Petitioner would exclude, interact with employees in preparation department, which the Petitioner includes, when the scaling department employees deliver the ingredients and spices they have portioned and mixed to the preparation department employees. In addition, the record did not establish that employees in the disputed departments—scaling, cryomix, sauce, and thermix—receive any advanced training or require special skills than employees in the departments included in the petitioned-for unit. As for the Petitioner's argument concerning lines of supervision, as indicated

elsewhere in this Decision, I find that there is common supervision, by the production director and managers, of the employees that the Petitioner seeks to include in, and exclude from, the unit.

Finally, I reject the Petitioner's argument about the assertedly dangerous working conditions. The conditions the Petitioner points to—heat and slippery floors—apply equally throughout the production departments. Except for the retail packing department (which the Petitioner seeks to include), all of the departments in the petitioned-for unit and the departments in dispute are located in the same building. The preparation department is not unique in having heat emanating from equipment such as the grills, broilers, and searing plates. Employees in the thermix department, which the Petitioner would exclude, cook the vacuum-sealed food packs in high-temperature water in accordance with the *sous-vide* cooking method. Likewise, although pork grease may be particular to the preparation department, other products used in the production process, such as the ingredients used in the scaling, cryomix, and sauce departments or even the water used in the thermix department (all of which the Petitioner would exclude), could make the floors slippery and create the same assertedly dangerous working conditions. Moreover, there is no showing that the work performed by the employees in several departments that the Petitioner seeks to include in the unit (e.g., receiving, packing, and retail packing) work under conditions that are hazardous, or that those employees' working conditions are any more dangerous than the conditions for employees in the departments that the Petitioner would exclude (e.g., scaling). While the Petitioner points to the heat and slippery floors in the preparation department as the more dangerous working conditions that justify the exclusions, even assuming this to be true, I note that the Petitioner is only relying upon the conditions in one of the departments it seeks to include in the unit. The Petitioner is thus not uniformly including, or excluding, departments in the unit on the basis of dangerous working conditions.

For the reasons I identify above, I find the petitioned-for unit, excluding employees who work in the scaling, cryomix, sauce, and thermix departments, is a fractured unit for excluding these particular production departments while including all other production departments in the unit. See *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011). None of the Board's traditional community of interest factors suggest that employees in the petitioned-for unit share a community of interest that employees in the scaling, cryomix, sauce, and thermix departments do not equally share, such that the unit boundaries should be set to include employees in the receiving, preparation, multivac, freezer, packing, retail packing, and sanitation departments, but not the scaling, cryomix, sauce, and thermix departments. *Id.*

The Petitioner indicated at the hearing that it would proceed to election in any alternate unit if I determined the petitioned-for unit was inappropriate. Thus, I find the smallest appropriate unit encompassing the petitioned-for employees includes employees who work in the receiving, scaling, cryomix, sauce, preparation, multivac, thermix, freezer, packing, retail packing, and sanitation departments at the Employer's Alexandria, Virginia, facility. See *A.S.V., Inc.*, 360 NLRB No. 138 (2014), fn. 1, citing *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). The employees in this unit are readily identifiable and share a community of interest.

The Record Evidence Fails to Establish that Employees Classified by the Employer as Supervisor and Shift Leader Are Section 2(11) Supervisors

With regard to the second issue presented here, I conclude that the Petitioner failed to meet its burden of proving, by detailed, specific record evidence, that the employees classified by the Employer as supervisor, shift leader I and shift leader II are Section 2(11) supervisors. As the Petitioner was the party asserting that individuals in these classifications were statutory supervisors, the Petitioner was tasked with the burden of proof on this issue. No individuals classified as supervisor or shift leader testified at the hearing. Rather, the Petitioner's evidence consists of the testimony of three employee witnesses, all of whom are operators in the preparation department. The Petitioner argues the supervisors and shift leaders are Section 2(11) supervisors because they: are assigned to specific departments; transfer employees to other departments; perform oversight; initiate the disciplinary process; take employee complaints; are regarded by employees as supervisors; and responsibly direct employees by providing re-training when they see that an employee is performing unsatisfactory work. The Petitioner does not contend, and the record evidence does not show, that the supervisors and shift leaders have the authority to hire, suspend, lay off, recall, promote, discharge, reward or effectively recommend such action. Thus, the supervisory indicia at issue are to: transfer; discipline; assign or responsibly to direct; and adjust grievances.

Overall, I find that the evidence here falls short of providing the kind of detailed and specific evidence the Board requires when establishing supervisory status. See *Wackenhut Corp.*, 362 NLRB No. 134, slip op. at 2 (2015)(citing *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), *Lynwood Manor*, 350 NLRB 489 (2007), and *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006)). The record evidence did not show that either the supervisors or shift leaders have the authority to transfer or effectively recommend such action. The production director clearly testified that the supervisors and shift leaders do not have that authority, and that he determines how many employees will work in each department and what tasks each department needs to complete. The Petitioner's evidence—that one employee was told by a supervisor to move to another area within the same department, and that another employee was told by a supervisor to move from the preparation department to the multivac department—is inconclusive. These limited examples did not show the exercise of independent judgment in making the transfer decisions. Further, there was no indication that either transfer was initiated by the supervisor, rather than directed by the production director or manager and then communicated to the employee by the supervisor.

In addition, the record fails to establish that the supervisors and shift leaders have the authority to discipline or effectively recommend discipline. On this issue, the Petitioner asserts the supervisors or shift leaders initiate the disciplinary process. However, the production director testified that he investigates the facts surrounding a potential disciplinary situation, and he determines whether or not to issue discipline without consulting with the supervisor or shift leader. These facts directly contradict the case cited by the Petitioner in its brief, *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003), where there was no independent investigation of the facts reported by the alleged supervisor. Here, the production director also testified that the supervisors and shift leaders do not give recommendations regarding discipline, and there is no record evidence to the contrary. In addition, the Petitioner's witnesses conceded that disciplinary notices are signed and issued by human resources officials. Even if the notices had been signed by a supervisor or shift leader, that fact alone would be insufficient to show the

supervisor or shift leader exercised the required independent judgment in the issuance of the discipline. *Wackenhut Corp.*, 362 NLRB No. 134, slip op. at 2.

Next, on the issue of whether the employees classified as supervisors or shift leaders had the authority to assign or responsibly direct other employees in their duties, the Petitioner's witnesses testified that supervisors tell them what room to go to, give them orders, and check the quality of their work. However, the Petitioner presented no evidence on whether the supervisors or shift leaders are held accountable by the Employer for the work performance of the employees. Nor did the Petitioner present any evidence to show that the supervisors and shift leaders were in danger of suffering "adverse consequences" if the employees whom they assigned tasks failed to perform those tasks properly. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Likewise, the evidence did not show if any supervisor or shift leader had been reprimanded—or rewarded—as a result of anything the employees had done or failed to do. Thus, even if the limited testimony of the Petitioner's three operator witnesses did indicate, as the Petitioner argues, that supervisors and shift leaders assign and responsibly direct the operators in their duties, it certainly fails to show that the supervisors or shift leaders exercised independent judgment when directing the operators' work.

Finally, the record fails to establish that supervisors or shift leaders adjust grievances. The Petitioner's evidence was limited to operators testifying that they presented grievances to a supervisor. The Petitioner did not establish that the supervisor took any action to adjust those grievances. Rather, the production director testified that the supervisors and shift leaders bring the issues to him, and he then investigates and decides how to respond.

The other factors mentioned by the Petitioner—that supervisors and shift leaders are regarded by operators as supervisors, are designated by the Employer as supervisors, and spend a portion of their time working at a computer instead of alongside the operators—are secondary indicia of supervisory status and do not independently establish Section 2(11) status.

For these reasons, I find that the Petitioner failed to meet its burden by specific, detailed record evidence, and that the record is insufficient to prove that the employees classified by the Employer as supervisor, shift leader I and shift leader II are Section 2(11) supervisors.

CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees classified by the Employer as operator, supervisor, shift leader I and shift leader II in the receiving, scaling, sauce, cryomix, preparation, multivac, thermix, freezer, packing, retail packing, and sanitation departments employed by the Employer at its Alexandria, Virginia facility, excluding all chefs, employees in the trucking, maintenance, delivery, and quality control departments, office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

Since I am directing that an election be held for a unit that is larger than the petitioned-for unit, I shall grant the Petitioner two business days from the date of issuance of this Decision and Direction of Election to provide an adequate showing-of-interest for the expanded unit. If the Petitioner fails to provide an adequate showing of interest, I shall dismiss the petition.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 400.

A. Election Details

The election will be held on Friday, August 28, 2015, from 11:30 a.m. to 5:00 p.m. in the Quality Control Lab Department at the Employer's plant currently located at 4112 Wheeler Avenue, Alexandria, Virginia.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending who were employed during the payroll period ending immediately before the date of this Decision,¹⁹ including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

¹⁹ The Employer indicated in its July 17, 2015 Statement of Position that employees were paid bi-weekly, and the last payroll period ending date was July 11, 2015. The Employer confirmed

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **FOUR business days after the date of issuance**.²⁰ The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-April-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

the latter at the hearing. Thus, I surmise that the payroll period ending date immediately preceding this Decision is August 8, 2015.

²⁰ At hearing, the Petitioner waived the ten-day period with the voter list prior to any election.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

August 20, 2015

(SEAL)

Dated: August 20, 2015

/s/ *Charles L. Posner*

Charles L. Posner, Regional Director
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